

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA**

CIVIL APPEAL NO. 13 OF 2017

(Originated from Civil Case No. 56/2012, Resident Magistrate Court of Arusha at
Arusha)

PETER S. MOLLEL 1ST APPELLANT

JB ADVERTISE AND PROMOTIION CO. LTD &

DEBTOR COLLECTION 2ND APPELLANT

VERSUS

ABDALLAH MUSA MSUYA 1ST RESPONDENT

PETER K. MOSHROW 2ND RESPONDENT

JUDGEMENT ON APPEAL

S.M MAGHIMBI,J:

This appeal is against the Judgement and Decree passed by the Resident Magistrate's Court of Arusha at Arusha in Civil Case No. 56/2012 whereby the appellants/defendants were sued by the respondents/plaintiffs for judgment and decree that:

- i. That, the defendant be condemned by the order of the trial court to release the 1st plaintiff's motor vehicle with Registration No. T. 800 AJW made Chaser Saloon in a good condition, the defendant further being order to pay Tshs. 6,000,000/= being costs of retaining such motor vehicle for sixty days.

- ii. That, the trial court be pleased to grant an order to the defendants to pay the plaintiffs general damages to be assessed by the court.
- iii. That, the trial court be pleased to grant an order for the defendant to pay to the plaintiffs interest of amount claimed (shs. 6,000,000/=) at commercial bank rate 18% per annum on the decretal amount from the date of filing the suit to date of judgment and further order of the court to pay plaintiff's interest at commercial rate 7% per annum on decretal amount from the date of judgment to final payment of the decretal sum.
- iv. An order condemning the defendant to pay costs of the suit.
- v. Any other relief(s) as the trial court deemed fit and just to grant.

The plaintiffs'/respondents' claim were partly awarded by the trial court. The award was to the extent that the Motor Vehicle in dispute with Registration No. T. 800 AJW Chaser Saloon be returned to the respondents by the appellants. The appellants were also condemned to pay for the costs of the suit.

Aggrieved by the decision of the Resident Magistrate, the appellants herein referred this appeal raising nine grounds of appeal that:

1. The Trial Magistrate failed to evaluate properly the evidence on records hence reaching at erroneous final decision.
2. The learned Magistrate erred in law and in fact for failure to consider the evidence adduced by the appellants and their witness in regard to the second loan.

3. The Trial Court erred both in law and in fact in ordering the Defendants (Appellants) to return the Motor Vehicle with Registration No. T800 AJW made Saloon pledged as a security to the Respondents (Plaintiffs) while the Respondents (Plaintiffs) has not proved the ownership of the said Motor Vehicle.
4. The Trial Court erred both in law and in fact by not taking into consideration the evidence tendered by the Appellant's that the first Respondent borrowed Tanzanian Shillings Five Million five hundred thousand [Tshs. 5,500,000/=] from the Appellant.
5. The Trial Court erred both in law and in fact in holding that, the fact that the second Plaintiff (second Respondent) borrowed another Money from the first Appellant was not proved to the satisfaction of the Court.
6. The Trial Court erred both in law and in fact in holding that the second loan agreement between the first appellant was not reduced into writing.
7. That trial Court erred both in law and in fact by ordering the Appellants to return the Motor Vehicle with Registration No. T. 8000 AJW made Saloon in a good condition while the Respondents herein did not prove their case to the standard required in civil cases.
8. The trial Court erred both in law and in fact by not considering the evidence tendered by the appellants and thus came with erroneous decision.
9. The trial Court erred in law by failure to comply with the mandatory requirement of Order XIII Rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2002 in admitting the exhibits.

The appellants prayed for the following orders:

1. An order compelling the second Respondent to pay the Appellant sum of Tanzanian shillings Five Million five hundred thousand (Tshs. 5,500,000/=) being principal sum loaned to him.
2. An order for payment of the interest of 25% per annum from 15th November, 2012 to the date of Judgment of this Appeal and thereafter at the rate of 12% per annum from the date of Judgment in the Appeal till the date of full and Final payment.

In this appeal the appellants were represented by Mr. Gwakisa Sambo, learned Advocate while the respondent was represented by Mr. John Shirima, learned Advocate. The determination of this appeal shall begin with the 9th and last ground of appeal that the trial court erred in law by failure to comply with the mandatory requirements of order XIII Rule 4 of the Civil Procedure Code, Cap 33 R.E 2002 (The CPC) in admitting the exhibits.

Mr. Sambo's submissions were that it is now settled principle in our jurisdiction that failure of the trial magistrate or judge to comply with the mandatory requirements of Order XIII Rule 4 of the CPC render the entire proceedings after the admission and endorsement of Exhibit P₁ a nullity. That the law insists that, in admitting the Exhibits in Court, Order XIII Rule 4 of the Civil Procedure Code, Cap 33 R.E 2002 must be complied with. He cited extinguished Authors, S.C. Sakar and Prabhas C. Sarkar in their book, "**Sakar The Law Of Civil Procedure Code**", 9th Edition, 2000 at page 1159 and 1160, where the learned authors, while giving the meaning and interpretation of the order XIII Rule 4 of the Indian Civil Procedure

Code Act Number V of 1908, which is *parimaterial* to our Order XIII Rule 4 of Cap 33 R.E 2002, had this to say,

"Documents admitted on the record without making endorsement prescribed by this rule cannot be regarded as being legally before the court. The importance of strict compliance with the procedure laid down was emphasized by judicial committee and it was held that the appellate court may refuse to read or permit to be used any document not endorsed in the manner required."

Mr. Sambo further cited another, extinguished author, **J.M Shelat**, in his book "**Mulla on the law of Civil Procedure Code**", 14th Edition, Volume II, at page 1190, when the Learned Author while giving the meaning and interpretation of the order XIII Rule 4 of the Indian Civil Procedure Code Act Number V of 1908, which is *parimaterial* to our order XIII Rule 4 of Cap 33 R.E 2002, had this to say,

"Shall be endorsed, the rules as to endorsements admitted in evidence must be strictly followed."
[Emphasis Supplied]

He submitted further that this position was put on rest in our jurisdiction by the Court of Appeal of Appeal of Tanzania, **firstly**, in the case of **A.A.R. Insurance (T) Ltd vs Beatus Kisusi, Civil Appeal No.67/2015, Court of Appeal of Tanzania at Mwanza**, (Unreported) where the Court expunged all the exhibits from the records because they were admitted without being endorsed as required by Order XIII Rule 4 of the C.P.C whereby the court, stated:

"once exhibit is admitted, if it is admitted, if it is in civil proceedings it must be endorsed as provided under Order XIII Rule 4 of the CPC and that the need to endorse is to do away with tempering with admitted documentary exhibits."

Mr. Sambo further cited the Court of Appeal of Tanzania at Arusha in the case of **Ally Omari Abdi vs Amina Khalil Ally Hildid, Civil Appeal No.103 of 2016**, (Unreported copy is attached), the Court of Appeal at page 12 the had this to say;

"As correctly submitted: by the learned counsel for the appellant and for the respondent, the documents on pages 148 to 154 (marked on page 148 as "Exp1") were admitted without complying with the provisions of paragraphs (a), (b), (c) and (d) of Order XIII Rule 4 in so far as the (Land Case No. 9 of 2013); the name of the person producing the document (Amina Kalile Ally); date on which it was produced (06/01/2015); and statement of this document having been so admitted - were not endorsed on the exhibit.

We think, centrality of the documents falling under Exhibit P-1 in establishing who the real administrator of the estate of the deceased called for strict compliance with provisions of Order XIII Rule 4 of the C.P.C."

He argued that the Court at page 20 of the judgment went on to invoke its power under Section 4(2) of the Appellate Jurisdiction Act and quashed and set aside all the proceedings in Land Case No.9 of 2013 which followed

after the framing of issues right up-to and including the judgment and decree of the High Court.

As for the current case, Mr. Sambo submitted that the records of the trial court show that in admitting Exhibits P1, P2, P3, P4, D1, D2, and D3 the trial court did not endorse to the documents so admitted as required by order XIII Rule 4(1) of Cap 33 R.E. 2002. He hence argued that as per authorities cited above, the failure of the trial magistrate to comply strictly with Order XIII Rule 4(1) of the Civil Procedure Code, Cap 33 R.E. 2002 renders the entire proceedings after the admission of the Exhibit P1 nullity. He hence prayed that this Honourable court declare all the proceedings after admission of the Exhibit P1 a nullity and the appellant be granted costs of this appeal.

In reply, Mr. Shirima argued that the Appellants have failed to discharge their duty for pointing errors of law and fact which the trial Court Magistrate faulted. Instead they raised a ground of objection against the decision of Hon. R.A. Ngoka- RM which is unacceptable at Appeal stage. He the submitted that even if this Court is convinced that, ground nine is not a Preliminary objection rather an error of law, yet the non-compliance of Order XIII Rule 4 of the CPC in admitting the exhibits is not the key issues to reverse decision of the trial Courts as concluded in the cited cases of **A.A.R. Insurance (T) Ltd** (Supra) and that of **Ally Omari Abdi** (Supra). He argued that he still maintains the position that the case of Case of A.A.R. Insurance (T) Ltd and Ally Omari Abdi cited by the Counsel for the Appellants are not relevant to our case at our hand because in the case of Ally Omari Abdi the Court of Appeal based its decision on the issue of

jurisdiction of the High Court. He argued further that if this Court is convinced that, ground nine is not a Preliminary objection rather an error of law, yet the Case of A.A.R. Insurance (T) Ltd left the avenue to the Appellate Court to expunge the exhibits from the record and not reversing or nullifying the proceedings of the trial Court as submitted by the Counsel for Appellant. He prayed that the ground nine is dismissed.

On my part, I have gone through the records of the trial court particularly the Exhibits P1, P2, P3, P4, D1, D2 and D3 and as correctly pointed out by Mr. Sambo, the exhibits are just labelled the number of exhibit for instance PExh 1 and the date which it was received. The provisions of XIII Rule 4 are that:

(1) Subject to the provisions of the sub-rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely-

- (a) the number and title of the suit;*
- (b) the name of the person producing the document;*
- (c) the date on which it was produced; and*
- (d) a statement of its having been so admitted;*
- (e) and the endorsement shall be signed or initialed by the judge or magistrate.*

The records of the trial court shows that it was only Order XIII Rule 4 (1) (c) & (e) which have been complied with by the trial magistrate. The exhibits did not comply with the remaining mandatory provisions hence lacking the number and title of the suit and the name of the person producing the document. In the case of **A.A.R. Insurance (T) LTD Vs**

Beatus Kisusi, Civil Appeal No. 67 of 2015 (unreported) the Court had this to say:

"once the exhibit is admitted, if it is in civil proceedings, it must be endorsed as provided under O. XIII, R. 4 of the CPC..."

Consequently, the Court expunged the exhibits from the record because they were admitted without being endorsed. The position in this case was cited with affirmation by the Court of Appeal in **Civil Appeal No. 103 of 2016 between Ally Omari Abdiand Amina Khalil Ally Hildid (As an administratix of the estate of the late Kalile Ally Hildid)** when the Court held:

As correctly submitted by the learned counsel for the appellant and for the respondent, the documents on pages 148 to 154 (marked on page 148 as "Exp1") were admitted without complying with the provisions of paragraphs (a), (b), (c) and (d) of Order XIII Rule 4 in so far as the number and title of the suit (Land Case No. 9 of 2013); the name of the person producing the document (Amina Kalile Ally); date on which it was produced (06/01/2015); and statement of this document having been so admitted— were not endorsed on the exhibit.

The Court hence emphasized that:

"We think, centrality of the documents falling under exhibit P1 in establishing who the real administrator of the estate of the deceased called for strict compliance with provisions of Order XIII Rule 4 of the CPC.

The situation in the current case, as explained above is the same. The documents were admitted in contravention of the Order XIII Rule 4

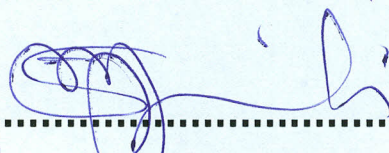
(10 (a) (b) and (d). The remedial measure under the circumstances is as suggested by Mr. Sambo citing the measures taken in the case of **Ally Omari Abdi** (Supra) whereby the court of Appeal quashed all the trial court proceedings from the date of the wrong admission of the exhibits. The same shall be the holding of this court. Having found that all the exhibits relied by the trial court were wrongly admitted, this court invoke its revisional powers by reversing and quashing all the trial proceedings of the trial court from the 08/03/2013 when the first exhibit P exhibit 1 was wrongly admitted right up to and including the Judgment and Decree of the trial Court. I further order that the file is remitted back to the trial court to proceed with the rehearing of the witnesses from PW1. The hearing shall however proceed before another trial magistrate of competent jurisdiction to try the matter.

Having found the specified proceedings a nullity, I am in no position to determine the other grounds of appeal which are based on facts and evidence. Furthermore, given the circumstances of this decision, each party shall bear its own costs.

Appeal partly allowed

Dated at Arusha this 16th day of March, 2018




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S. M. MAGHIMBI
JUDGE